In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
JESSE JOHNSON. } No. 59.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

In passing upon the several questions certified by the circuit court of appeals, I submit, for the consideration of the court here, the following argument, which I have taken from the brief prepared and used by the attorney for the United States in the court below, and which, I think, presents the case fully in behalf of the United States:

STATEMENT.

While the plaintiff was the incumbent of the office of United States district attorney, and in the month of July, 1891, he received letters from the officers of the Government directing him to examine the title to certain land

on Staten Island which was desired by the Government for the purpose of harbor defense. The title to said property was examined, said examination being a necessary prerequisite for a suit for condemnation which was afterwards instituted and carried through by the plaintiff, and for the services in both proceedings this action was brought. The Government admitted the rendition of the services and the value thereof, the same having been passed upon by the Attorney-General, but defends the action upon two grounds, first, that Mr. Johnson had received for services in the prior year a sum which exceeded the sum of $6,000 by an amount greater than that claimed in this action, and the Government set up as a counterclaim such payments alleged to have been erroneously made. It also interposed the further defense that the services rendered were such as were included within and paid by the salary of $200 a year.

Alleged evidence was given in the action to the effect that it had been a universal custom of the Department to pay for such services in addition to the usual salary of $200 per year. Upon these issues the case came on for trial before Justice Benedict, without a jury.

POINT I.

The services rendered were those imposed by law upon district attorneys, and, therefore, were included within his compensation of $200 per year.

We shall assume, for the present, that the services in question were such services as were imposed by law. The scheme under which the compensation for United States attorneys is provided may be conveniently divided

into three classes: First, such services as are included in the annual salary of the district attorney; second, such as are included in the fee bill; and third, cases otherwise expressly provided by law. The plaintiff rejects the fee bill (sec. 824). Hence, it must either come within such services as are paid by his annual salary or under the cases expressly provided by law. The sections bearing upon these various provisions are as follows:

> SEC. 770. The district attorney for the southern district of New York is entitled to receive quarterly for all his services a salary at the rate of $6,000 a year. For extra services the district attorney for the district of California is entitled to receive a salary at the rate of $500 a year, and the district attorneys for all other districts at the rate of $200 a year.
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> SEC. 823. The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers in the several States and Territories, except in cases otherwise expressly provided by law.

Then follows section 824, which provides the fee bill under which the greater part of the services in civil cases performed by district attorneys are paid. No compensation could be awarded to plaintiff under this section because there is no docket fee, the case never having been upon the calendar.

Congress has not left us in doubt as to the construction to be placed upon these various sections. Section 1764 provides as follows:

> No allowance or compensation shall be made to any officer or clerk by reason of the discharge of

duties which belong to any other officer or clerk in the same or any other department, and no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law.

SEC. 1765. No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.

It will thus be seen that the one thing which the National Legislature has intended to provide so plainly that it could not be doubted is that no district attorney should receive compensation for any of the services imposed by law, except the special provisions contained in sections 770, 823, and 824. In other words, that they shall receive for the various services classified under section 824 the fees therein mentioned, and that for all other services, except those expressly provided by law, the salary of $200 has been deemed sufficient.

Similar claims have from time to time been presented to the Government and the claimants have rested their respective cases upon a line of decisions of the Attorneys-General. An examination of them, however, discloses the fact that all have followed the authority of Attorney-General Cushing, decided January 25, 1855 (7 Op., 46). In none of these opinions does any Attorney-General

seem to have given the subject careful consideration, but they have each been content to rely largely upon the authority of their predecessor, so that each one of these opinions depends for its authority solely upon the case decided by Attorney-General Cushing above mentioned. This opinion seems to have been so important a factor in the settlement of this question, so far as it could be settled in the office of the Attorney-General, that a liberal quotation of it is here deemed useful:

> I have had some hesitation on this subject in view of the provisions of the act of Congress of February 26, 1853, defining the fees of district attorneys, marshals, and clerks of circuit and district courts. *The act provides no fee for this duty*, although it is required of district attorneys to make such examination of titles and abstracts thereof for the information of the Attorney-General, to enable him to pass on titles according to the provisions of the joint resolution of September 11, 1841. The duty is a delicate and important one, requiring legal science and much care and personal attention. On the whole it seems reasonable to consider the act of 1853 as providing the fees only of the duties enumerated; and that for duties not enumerated he is to have a fee either in analogy of those fixed by the act or at the discretion of the head of the department ordering the service.

It is thus seen that the decision of Attorney-General Cushing was, in fact, a determination that a district attorney might receive fees not included in the fee bill (section 824), nor under any express provision of law; but he based his decision entirely upon the equitable view, outside of any special provision of the statute.

No Attorney-General in any of the line of opinions thus given has contended that there was any special provision of law applicable to such service. It must, however, be admitted that the opinions of the Attorneys-General thus given, covering as they do such a long period of time and holding the same proposition without exception, would be of very high and perhaps controlling authority, were it not for the fact that the Supreme Court of the United States has passed upon the question, holding directly to the contrary. The decision was rendered in the case of *Gibson* v. *Peters* (150 U. S., 342). That was an action brought by United States Attorney Peters against a receiver appointed under the national banking act for services rendered to him as such receiver. Justice Harlan delivered the opinion of the court, and disposed of the proposition in the following language:

> A distinct provision is made for the salary of a district attorney, and he can not receive on that account any more than the statute prescribes. But the statute is equally explicit in declaring in respect to compensation that may be taxed and allowed that he shall receive no other than that specified in sections 823 to 827, inclusive, except in cases otherwise expressly provided by law.

Justice Harlan has thus announced the very converse of the proposition which was made the basis of the opinion of Attorney-General Cushing and all of his successors. The proposition is further emphasized by the following language:

> Congress evidently intended to require the performance by a district attorney of all the duties imposed upon him by law without any other remuner-

ation than that coming from his salary, from the compensation or fees authorized to be taxed and allowed, and from such other compensation as is expressly allowed by law specifically on account of services named.

See also *Cole* v. *United States*, 28 C. Cls., 501.

In this connection reference should be made to section 3, chapter 328, of the Laws of 1874, which reads as follows (18 Stat., 109):

> No civil officer of the Government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States beyond his salary or compensation allowed by law: *Provided*, That this shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys as now allowed by law for the performance of services not covered by their salaries or fees.

This clause was interpreted by Comptroller Lawrence, in the case of *Bliss* v. *United States* (5 Lawrence, 38), as an authority to pay compensation to district attorneys for services similar to those performed in this case; but he was overruled in that respect in the case of *Collins* v. *United States* (15 C. Cls., 15). The court there held that the proviso of that section was not an enabling act, but was simply a modification of the previous clause of the section. It is purely negative in its character and accords no affirmative relief. Its language is that nothing shall prevent the employment of district attorneys, etc., as now allowed by law; but this section was passed and this language was used and adopted by Congress at a time when all of the provisions previously quoted in this brief were in force. The only provisions

especially allowed by law for payments to district attorneys were then as now under section 825, which provides for a payment to him of 2 per cent upon all moneys collected or realized in any suit or proceeding arising under the revenue laws; section 827, which provides that "when a district attorney appears by direction of the Secretary or Solicitor of the Treasury on behalf of any officer of the revenue in any suit against such officer * * * that he shall receive such compensation as may be certified to be proper by the court in which the suit is brought and approved by the Secretary of the Treasury;" and section 4646, which provides for extra compensation in prize cases.

The services described in the complaint were included in services imposed by law upon district attorneys.

We have thus far considered the question upon the assumption that the services rendered by the plaintiff were such services as were imposed upon him by law. This assumption can be easily sustained; and first, with reference to his services in examining the title. Section 355 provides as follows:

> SEC. 355. No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy-yard, custom-house, light-house, or other public building of any kind whatever until the written opinion of the Attorney-General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given. *The district attorneys of the United States, upon the application of the Attorney-General, shall furnish any assistance or information*

> *in their power in relation to the titles of the public property lying within their respective districts.* And the Secretaries of the Departments, upon the application of the Attorney-General, shall procure any additional evidence of title which he may deem necessary, and which may not be in the possession of the officers of the Government, and the expense of procuring it shall be paid out of the appropriations made for the contingencies of the Departments, respectively.

In view of this section, it can not be seriously contended that the duty of examining a title did not come under those duties which are imposed by law upon United States district attorneys. This question was also determined in the case of *Collins* v. *United States*, above quoted.

It is equally clear that the services rendered in the condemnation proceedings were also imposed by law. Section 771 provides as follows:

> It shall be the duty of every district attorney to prosecute in his district all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury.

Here was a proceeding instituted in behalf of the United States, involving a direct issue with the owners of the land in question; and it is not believed that any

further argument is required to substantiate the position that the conduct of such proceedings was a duty imposed by law upon the plaintiff at the time they were being conducted.

POINT II.

The defendant in error had already been paid by the receipt of moneys during the previous year which were in excess of $6,000 by an amount exceeding the claim presented in this action.

The Government further defends the claim presented here upon the ground that plaintiff has already been paid.

The accounts between Mr. Johnson and the Government for the preceding year have been put in evidence (see fol. 247), and they show that he received in excess of his limit of $6,000 an amount equal to the sum claimed in this action; and the Government asks that that amount should be applied in liquidation of the claim presented here as payment. The stipulation between the parties (fol. 104) simplifies this proposition, so that the court is only called upon to consider the proposition of law, as to whether the services in question are such as come within the limit of $6,000 provided by statute as the amount beyond which a district attorney can not receive for his compensation and emoluments; second, whether or not, if it comes within such provision, the excess paid to Mr. Johnson the previous year can be applied now in liquidation of this claim.

Section 835 provides:

> No district attorney shall be allowed by the Attorney-General to retain of the fees and emoluments

of his office which he is required to include in his semiannual return, for his personal compensation, over and above the necessary expenses of his office, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the Treasury Department, a sum exceeding six thousand dollars a year, or exceeding that rate for any time less than a year.

Section 833 provides:

> Every district attorney, clerk of a district court, clerk of a circuit court, and marshal, shall, on the first days of January and July in each year, or within thirty days thereafter, make to the Attorney-General, in such form as he may prescribe, a written return for the half year ending on said days, respectively, *of all the fees and emoluments of his office, of every name and character*, and of all the necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year. He shall state separately in such returns the fees and emoluments received or payable under the bankrupt act. * * * Said returns shall be verified by the oath of the officer making them.

The substance of the two sections above quoted is that fees and emoluments "of every name and character" are included within the prohibition of this section. Mr. Johnson received in the previous year a sum more than he was entitled to, and which excess was equal to the amount claimed in this action. The Government, therefore, has paid him in advance for all of the services set up in the petition.

Objection is made that, conceding the contention of the Government that money by way of emoluments and

compensation was paid to him by mistake the prior year in excess of his $6,000 to which he was limited, yet it can not be recovered back. Such probably is the law as to individuals, but not as to the State and Government. It would certainly be most dangerous to hold that the act of an officer of the Government, in paying out money of the Government upon erroneous understandings of the law, should bind the Government so that it could not be recovered back. For the same reason that the statute of limitations in many instances does not run against the Government, and that interest can not be recovered against it, nor costs, it ought to be exempted from this rule of law. It is powerless to guard against mistakes of its officers, and it is believed is not exposed to the strict application of the rule contended for.

POINT III.

The Government is not bound by the former rulings of the Department of Justice.

The Government is confronted with a proposition that a long-continued practice of its accounting officers, sanctioned and confirmed by the opinions of the Attorneys-General, has permitted the construction contended for by the plaintiff, and by that construction the Government is now bound, irrespective of whatever might otherwise be decided as the legal interpretation of the statutes affecting the issues in this case.

(*a*) No legal evidence of any such custom was given.

This proposition depends upon evidence which may be found at folio 109 *et seq.* of the case. The plaintiff offered in evidence a pamphlet issued by the treasurer of

the department purporting to contain opinions of the Comptroller in which he cited opinions of Attorneys-General, and it is alleged by the plaintiff that those opinions of the Attorneys-General establish such a custom. No other evidence was offered upon this subject, as appears by the plaintiff's statement in the eleventh folio, as follows:

> Mr. JOHNSON. I think I am willing to rest upon the opinions of the Attorneys-General.

No argument will be indulged in upon this proposition, as it is elementary. It is well known to the court that opinions of the Attorneys-General are published in book form, and if the opinion of the head of the Department were evidence of the conduct of that Department, certainly the opinions themselves might have been produced. The plaintiff, however, has chosen to rely upon an opinion written by the Comptroller, in which he quotes from said opinions without even purporting to give them in full.

It is respectfully insisted that this is no evidence of what the actual custom and conduct of the Department was during this period.

(*b*) Assuming that the opinion of Comptroller Bowler, found upon pages 54–82 of the record, is evidence of the Department, it fails to afford any ground of liability by the Government under the circumstances of this case.

The abstract proposition is stated in the case of *United States* v. *Moore*, by Justice Swayne in 95 U. S., 760, 763:

> The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought

not to be overruled without cogent reasons. *Edwards* v. *Darby*, 12 Wheat., 210; *United States* v. *State Bank of North America*, 6 Peters, 29; *United States* v. *McDaniel*, 7 Peters.

It has been held in other cases that—

> In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who are called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.

The proposition was more elaborately stated in *United States* v. *Hill* (120 U. S., 169), where the issue involved the allowance of certain fees to a clerk. It was the custom in the United States courts in Massachusetts, from 1839 to December, 1884, known and approved by the judges, for the clerk to charge $3 as fees in naturalization proceedings. The clerk of the district court never included those fees in his return. That fact was known to the judges to whom his accounts were semiannually exhibited, and by whom they were passed without objection in this particular. Relying on that custom, and believing that those fees formed no part of the emoluments to be returned, the clerk of the district court appointed in 1879 did not include those fees in his accounts. This was known to the district judge when he examined and certified the accounts, and his accounts, so made out, to July, 1884, were examined and adjusted by the accounting officers of the Treasury. This was an action brought on the official bond of the clerk against him and his surety to recover the amount of naturalization fees which it was claimed by the Government the

clerk should have accounted for to the Government. On page 182 the court say:

> The agreed statement of facts shows * * * that the district judge has examined and certified the accounts, knowing that they did not include naturalization fees; and that these accounts have been revised on their merits by these accounting officers, for this long series of years, and been examined and adjusted by them with the naturalization fees not included.
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> With this long practice, amounting to a contemporaneous and continuous construction of the statute, in a case where it is doubtful whether the statute requires a return of the disputed fees, judges of eminence, heads of departments, and accounting officers of the Treasury having concurred in an interpretation in which those concerned have confided, the surety in the present bond, as well as his principal, had a right to rely on that interpretation in giving the bond; and the semiannual accounts of the principal having been actually examined and adjusted at the Treasury, with the naturalization fees excluded, down to and including the one last rendered, five months before this suit was brought, a court seeking to administer justice would long hesitate before permitting the United States to go back, and not only as against the clerk, but as against the surety on his bond, reopen what had been settled with such abundant and formal sanction. This principle has been applied as a wholesome one for the establishment and enforcement of justice in many cases in this court, not only between man and man but between the Government and those who deal with it and put faith in the action of its constituted authorities, judicial, executive, and administrative.

The case of *United States* v. *Hill* presents the question in the nature of an estoppel; but the facts in this case

fall far short of the conditions upon which the court was called upon to speak in that case. The only evidence presented is that of a series of opinions by Attorneys-General. The court is not informed what action the officers of the Government have taken, but the plaintiff has been content to rest solely upon the opinions of the Attorneys-General, and these opinions are not shown to be uniform except upon the question contained in the first cause of action mentioned in his complaint, to wit, services in examining the title to the lands which were made the subject of the condemnation proceedings. The evidence in this case is to the effect that such examination was not an independent retainer but was necessary to the suits for condemnation proceedings, and a part of the services rendered in said action (fol. 101); in fact, no special retainer is shown in the papers, nor any request for such proceedings to be taken other than the general authority to condemn the property on behalf of the United States.

We are, therefore, led to consider the question simply as to whether the services of Mr. Johnson in prosecuting the actions to condemn the property in question entitled him to other than the compensation mentioned in section 824. It is denied that there is any such line of decisions, or any such course of conduct on the part of the Government as to create an estoppel under the authority of *United States* v. *Hill*, above quoted. There are many cases in which attorneys have been paid for services in prosecuting actions by the United States at the request of heads of Departments and otherwise, and many cases where compensation for such service has been denied; but not one

in which the services in an action brought to condemn property in behalf of the United States has been passed upon by the Attorneys-General or high Government authority, except the single instance in which the plaintiff herein was paid for similar services the year prior to that in which the services in question were rendered. As far back as 1855 we find the opinion of Attorney-General Cushing, in the seventh volume of Opinions of Attorneys-General, page 84, in which he held that for the duty of preparing titles for the examination of the Attorney-General under joint resolution of September 11, 1841, equitable compensation might be made to a district attorney out of the appropriation for public work, the site of which was in question, yet he held that for a general action, in which the United States was a party, a district attorney could not recover for services. His language was as follows:

> But in a matter like that now before me, which is of the direct official business of a district attorney in the court of the United States for his district, which is of the very class of business for which the act of 1853 expressly and in plain terms provides, and as to which any other compensation is emphatically excluded by the strong terms of that act, it does not appear to me that any extra or special compensation can be lawfully paid to the district attorney.
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> Nor, in my judgment, is the case taken out of the general rule by the fact that the suit concerns immediately the business of the Navy Department, and has been the subject of instructions from the Secretary of the Navy. All the civil business of

> the Government concerns some one of its Departments, and may require the attention of its head. It can not be that a suit in the name of the United States, pending in the district or circuit court, is out of the scope of the regular duty of a district attorney because of its arising in the business of the Navy Department rather than the Treasury or any other Department; nor that in such a case the service of the district attorney becomes that of counsel specially retained by the Department.
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> This latter enactment must have been designed, it seems to me, for contingencies, where a head of Department needs professional services in a case not provided for by the particular terms of the law, and the special compensation to a district attorney for the performance of such service must depend on that fact, not on the fact that he has been instructed by the head of Department. A contrary construction would lay the foundation for extra compensation to district attorneys in almost every case in which they appear in civil actions in which the United States are concerned.

Thus the plaintiff had before him the opinion of Attorney-General Cushing to the effect that no services by a district attorney when performed in any action where the Government in any of the United States courts was a party should be paid for other than that provided in section 824, unless some special provision of law could be invoked in its support.

Attorney-General Black was equally plain and specific in his opinion, contained in the ninth volume, Opinions of Attorneys-General, page 146. He says:

> When a duty is enjoined upon him by the law of his office and not merely by the request of a

> Department, he is bound to perform it and take as compensation what the law gives him. That is his contract, and if it be a bad one for him he has no remedy but resignation. The subject is not open to a new bargain between him and any other officer of the Government. All criminal prosecutions and all civil suits in which the United States are a party of record fall within this principle. In them no charge for extra services can be legally allowed, though it be true that some of them require an amount of labor and skill for which the compensation allowed by the fee bill is altogether inadequate. I can not make out in any way satisfactory to my own mind the ingenious distinction which would pay the officer as attorney what the fee bill gives and then pay him besides a *quantum meruit* for managing the same case as counsel.

There is, therefore, no element of estoppel. He had no specific precedents such as described in the case of *United States* v. *Hill*.

If now he relies upon the abstract proposition stated in the case of *United States* v. *Moore*, above cited, his contention certainly can not be sustained.

We are enjoined by that rule to give most respectful consideration to the construction given to a statute by those charged with the duty of executing it.

The Supreme Court, in *Swift* v. *United States* (105 U. S., 691, 695), also held:

> The rule which gives determining weight to contemporaneous construction put upon a statute by those charged with its execution, applies only in cases of ambiguity and doubt.

In *United States* v. *Graham* (110 U. S., 219, 221), Chief Justice Waite said:

> It matters not what the practice of the Departments may have been or how long continued, for it can only be resorted to *in aid of interpretation, and it is not allowable to interpret what has no need of interpretation.*

The principle, then, is that while respectful consideration must be given to the contemporaneous heads of Departments in determining the effect of a statute, nevertheless their conduct and decisions can not be controlling nor considered in a doubtful case.

The Supreme Court, in the case of *Gibson* v. *Peters* (150 U. S., 342, 347), above quoted, decided that actions similar to this are not a subject of doubt. After referring to the sections providing for the fees of district attorneys, Justice Harlan says:

> It also declares that he shall receive no other compensation than that specified in sections 823 and 827, inclusive, except in cases otherwise expressly provided by law. It also declares that no officer in any branch of the public service shall receive any additional pay, extra allowance, or compensation in any form whatever for any service or duty, unless the same is expressly authorized by law or unless the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation. No room is left here for construction. It is not expressly provided by law that a district attorney shall receive compensation for services performed by him in conducting suits arising out of the provisions of the national banking law in which the United States or any of its officers or agents are parties.

> Without such express provision, compensation for services of that character can not be taxed, allowed, or paid. Nor can the expenses of the receivership be held to include compensation to the district attorney for conducting a suit in which the receiver is a party, for the obvious reason that the statute does not expressly provide compensation for such services. Congress evidently intended to require the performance by the district attorney of all the duties imposed upon him by law without any other remuneration than that coming from his salary, from the compensation of fees authorized to be taxed and allowed, and from such other compensation as is expressly allowed by law specifically on account of services named.

The court was then speaking of services rendered under section 380, which required an official duty of the district attorney in national-bank cases. The language is almost precisely the same as that contained in section 771, requiring attorneys to prosecute all civil actions in which the United States are concerned. Both sections impose the duty upon the district attorney. The effect, therefore, of the decision in *Gibson* v. *Peters* is precisely the same as though the court were deciding a case with reference to the compensation for conducting condemnation proceedings.

We thus are able to invoke the highest authority, to wit, the judgment of the Supreme Court, in support of the position of the Government upon this proposition, as well as those considered in the earlier part of this brief. No argument has been urged in this action that could not with equal propriety and force have been urged in the case of *Gibson* v. *Peters*. And thus the Supreme

Court, with the opinions of the Attorneys-General before it, with the same evidence of the alleged uniform ruling of the department that has been given in this case under its consideration, has determined the proposition that a district attorney can not recover for any services which are imposed by law upon him anything in the nature of extra compensation. It not only decided this, but it also made its decision in the face of the fact that the ruling of the department with reference to services rendered to a receiver under the national banking act entitled the district attorney to extra compensation (19 Op., 152).

Nothing need be added here on the subject of the merits of this case. No time need be spent in the endeavor to sustain the proposition that Mr. Johnson should receive for the services proven more than can be paid to him under sections 823 to 827 above quoted. It may be conceded that under those sections he would not be sufficiently paid. It may be conceded that as an original proposition his services may have been worth all that is contended for, and yet the force of the legal proposition remains. There is absolutely no law under which a recovery can be had by the plaintiff. He had before him the statutes. They contained a plain and unqualified prohibition against his receiving pay for the services for which this action is brought. Courts, therefore, are not called upon, nor have they a right, to create any new laws for the purpose of affording compensation which it might be disposed otherwise to give to the plaintiff. Its duty is to enforce the law which it finds upon the statute book; and it is respectfully submitted that since that law

has recently been pronounced by the highest court of the United States clearly and unqualifiedly adverse to the claim of the plaintiff, no course is left but to obey that decision and determine this matter in favor of the Government. Such considerations require a reversal of the judgment.

JAS. E. BOYD,
Assistant Attorney-General.